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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHRISTOPHER S. ORRILL et al., Plaintiffs and Appellants, v. CITIMORTGAGE, INC., et al., Defendants and Respondents.	B258347 (Los Angeles County Super. Ct. No. BC526137)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Katchko, Vitiello & Karikomi and GianDominic Vitiello for Plaintiffs and Appellants.

Akerman, Karen Palladino Ciccone and Robert R. Yap for Defendant and Respondent CitiMortgage, Inc.

First American Law Group and Patrick Reider for Defendant and Respondent Quality Loan Service Corporation.

Dinsmore & Sandelmann, Frank Sandelmann and Kirsten E. Stockton for Defendant and Respondent Martingale Investments, LLC.

Christopher and Stacey Orrill (Plaintiffs) appeal from a judgment entered after the trial court sustained without leave to amend a demurrer to their first amended complaint by defendants CitiMortgage, Inc. (Citi), Quality Loan Service Corporation (QLSC) and Martingale Investments, LLC (Martingale).

In 2006, Plaintiffs obtained a mortgage loan from Citi secured by a deed of trust on two adjacent parcels of real property owned by Plaintiffs in Los Angeles, California. One parcel contained a single family residence, while the other was vacant. The deed of trust identified Plaintiffs' property by providing a legal description of the property, the assessor parcel numbers for both parcels and the street address.

Plaintiffs subsequently defaulted on their loan. In March 2012, Citi and QLSC, the loan's servicer, moved to foreclose by recording a notice of default. Although the notice of default referenced the deed of trust, it listed only the assessor parcel number for the parcel containing the house. In June 2012, QLSC recorded a notice of sale. As with the notice of default, the notice of sale referred to the deed of trust but listed only the assessor's number for the improved parcel.

In July 2013, more than a year after the notice of default and initial notice of sale were recorded, QLSC recorded a second notice of sale, setting the date for the foreclosure auction in early August 2013. As with the prior notices, the second notice of sale referenced the deed of trust but omitted to provided the assessor's number for the vacant parcel. In August 2013, Martingale purchased Plaintiffs' property at auction.

Plaintiffs filed suit in the fall of 2013, asserting a wide array of causes of action, seeking both damages and injunctive relief. Ultimately, Plaintiffs' claims were organized around two factual allegations: (1) at the time that Citi foreclosed it was still in the process of reviewing Plaintiffs' most recent loan modification application, thus making any foreclosure improper; and (2) the foreclosure sale was rendered void by the omission of the assessor's number for the vacant parcel. Each of the defendants demurred, arguing, inter alia, that Plaintiffs' amended pleading was fatally compromised by (a) the absence of any substantial irregularity in the foreclosure proceedings that prejudiced

Plaintiffs and (b) Plaintiffs' failure to allege facts establishing tender or an exception to the tender rule. The trial court found defendants' arguments to be meritorious and sustained the demurrers without leave to amend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Plaintiffs' Loan

In 2006, Plaintiffs obtained a mortgage loan from Citi. The amount of the loan was $560,000. The loan was secured by a deed of trust on property owned by Plaintiffs.

The deed of trust identified two parcels of land as collateral: a portion of "Lot 5 and All of Lot 6 Of Tract No. 12135, in the City of Los Angeles, County of Los Angeles, State of California" (the Property). While Lot 5 of Tract No. 12135 (Parcel 1) was "vacant land," Lot 6 (Parcel 2) contained a single family residence. The Office of the Assessor for Los Angeles County assigned each parcel an identification number: Lot 5/Parcel 1 – "2544-003-007"; Lot 6/Parcel 2 – "2544-003-008." These Assessor Parcel Numbers or APN's are referenced in the deed of trust as "2544-3-7+8." In addition to providing the legal description of the Property and the APN's, the deed of trust also provided the street address for the Property: 9720 Wheatland Avenue, Los Angeles California 91040-1430, which the deed of trust defined as the "Property Address."[1] (We will adopt the deed of trust's nomenclature and refer herein to the Property's street address as the Property Address.)

The original beneficiary under the deed of trust was Mortgage Electronic Registration Systems, Inc. (MERS), which was acting solely as Citi's nominee. In 2011, MERS subsequently assigned its interest over to Citi.

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[1] While the Wheatland Avenue address was listed by the Office of the Assessor as the "site address" for Parcel 2, no such street or site address was provided for the vacant Parcel 1.

II. Plaintiffs' Default on the Loan and Subsequent Foreclosure Sale

In 2011, Plaintiffs "were stricken with a series of financial hardships . . . [and] a severe downturn in available household finances." As a result, "Plaintiffs defaulted on the underlying mortgage loan."

On March 15, 2012, Citi recorded a substitution of trustee, naming QLSC as the new trustee under the deed of trust. That same day, QLSC recorded a notice of default and election to sell (Notice of Default), thereby instituting nonjudicial foreclosure proceedings on the Property.

The Notice of Default, inter alia, identified the amount of the loan ($560,000), how much Plaintiffs were in default at that time ($22,205.53), when that default began (July 1, 2011), and the Property. The Notice of Default identified the Property in three ways: (1) it referenced the deed of trust, which refers to both APN's, as well as to the "Property Address); (2) it provided the Property Address; and (3) it provided the APN for Parcel 2, the parcel that contained Plaintiffs' single family residence. The Notice of Default also noted that Citi contacted Plaintiffs in August 2010 to "assess their financial situation and to explore options to avoid foreclosure."

On June 20, 2012, a notice of trustee's sale was recorded (the Initial Notice of Sale). The Initial Notice of Sale set the date for the foreclosure sale of the Property as July 16, 2012. In addition, the Initial Notice of Sale identified the Property in several ways: by referencing the deed of trust; by providing the Property Address; and by providing the APN for Parcel 2.

On July 9, 2013, Plaintiffs submitted to Citi their "most recent" loan modification application. Previously, Plaintiffs had submitted "several completed first lien loan modification applications."

On July 12, 2013, more than a year after the Initial Notice of Sale, a second notice of trustee's sale was recorded (the Final Notice of Sale). The Final Notice of Sale set the sale for August 8, 2013. As with the initial notice, the Final Notice of Sale identified the

Property in several ways: by referencing the deed of trust; by providing the Property Address; and by providing the APN for Parcel 2.

On August 2, 2013, Citi sent a letter to Plaintiffs acknowledging receipt of Plaintiffs' latest loan modification application, and advising them that the "expected time frame needed to complete the review is 30 days from the date of the letter" and that they "may receive a call from the Specialist assigned to [their] account in an effort to obtain any additional information" and/or a "call from a property appraiser and/or real estate broker . . . ."

On August 8, 2013, QLSC sold the Property at a public auction to Martingale for $475,100. QLSC, as trustee under the deed of trust, conveyed "all right[,] title[,] and interest" in the Property to Martingale. The proceeds from the sale did not cover the amount of Plaintiffs' unpaid debt, which at that time totaled $645,939.49. The sale was conducted pursuant to the Notice of Default.

III. Plaintiffs' Lawsuit

On October 30, 2013, Plaintiffs filed a verified initial complaint, alleging six separate causes of action regarding the foreclosure sale. The central focus of Plaintiffs' original complaint was Citi's alleged failure to engage in a meaningful dialogue over a possible loan modification. By their complaint, Plaintiffs sought a wide range of monetary and equitable relief, including injunctive relief "cancelling and voiding" the foreclosure sale.

On December 23, 2013, Martingale demurred to Plaintiffs' original complaint. Before Martingale's demurrer could be heard, however, Plaintiffs filed a verified first amended complaint (the FAC). Specifically, Plaintiffs asserted claims in the FAC for the following: (1) violation of Civil Code section 2923.5; (2) violation of Civil Code section 2923.6; (3) violation of Civil Code section 2924f; (4) quiet title; (5) cancellation of instruments against all defendants; (6) fraudulent misrepresentation; and (7) violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. (UCL)). In addition to the alleged wrongs associated with Citi's loan modification process found in their

original pleading, Plaintiffs now added a new wrong, one based on the alleged failure to properly include the vacant Parcel 1 in the Notice of Default and the Notices of Sale. As with their original complaint, Plaintiffs sought a number of different remedies, including once more "cancelling and voiding" the foreclosure sale.

Each of the defendants demurred to the FAC. Although the defendants identified a host of purported failings with the FAC, two principal defects were identified: (1) Plaintiffs failed to allege facts establishing that they could and did in fact make a valid tender; and (2) Plaintiffs failed to allege facts showing a substantial procedural irregularity with the foreclosure sale.

In opposing defendants' demurrers, Plaintiffs repeatedly requested leave to amend, but did not expressly identify what additional facts they would allege if granted leave or explain how these additional facts would cure the deficiencies identified by defendants.

On June 19, 2014, the trial court sustained the defendants' demurrers without leave to amend. Plaintiffs timely appealed from the subsequently entered judgment of dismissal.

DISCUSSION

I. Standard of Review

We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and facts of which judicial notice can be taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "If the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits. However, in doing so, if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we must accept the construction offered by plaintiff." (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83.)

If, as here, the trial court sustained the demurrer without leave to amend, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid*.) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid*.) To satisfy that burden on appeal, a plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

II. Plaintiffs Failed to Allege a Cause of Action Against Citi

In the FAC, Plaintiffs asserted seven causes of action against Citi. With respect to each of those causes of action, Plaintiffs have failed to allege facts sufficient to state a claim.

A. First Cause of Action: Violation of Civil Code section 2923.5

Civil Code[2] section 2923.5 concerns the first step in the foreclosure process: the recording of a notice of default. Section 2923.5 "basically says that a lender cannot file a notice of default until the lender has contacted the borrower 'in person or by telephone.' [Citation.] Thus an initial form letter won't do. To quote the text directly, lenders must contact the borrower by phone or in person to 'assess the borrower's financial situation and explore options for the borrower to avoid foreclosure.'" (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 221 (*Mabry*).) "[T]he remedy for noncompliance [with section 2923.5] is a simple postponement of the foreclosure sale, nothing more." (*Id*. at p. 214; see *id*. at p. 235 ["the *only* remedy provided is a postponement of the sale before it happens"].) In other words, "the *sole* available remedy is 'more time' before a foreclosure sale occurs. [Citation.] After the sale, the statute provides no relief." (*Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526 (*Stebley*); see

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[2] All further statutory references are to the Civil Code unless otherwise indicated.

Lueras v. BAC Home Loans Serving, LP (2013) 221 Cal.App.4th 49, 77 (*Lueras*) [affirming dismissal of section 2923.5 claim because the "[FAC] did not seek postponement of the foreclosure sale and alleged the sale had been conducted"].)

The trial court sustained Citi's demurrer to Plaintiffs' section 2923.5 cause of action on the ground that the statute only "applies to postpone a foreclosure. This is not the circumstance here." On appeal, Plaintiffs concede this point. Accordingly, we affirm the trial court's ruling with respect to Plaintiffs' first cause of action.

B. Second Cause of Action: Violation of section 2923.6

The Homeowner's Bill of Rights (§§ 2920.5 et seq.) (HBOR), effective January 1, 2013, was enacted "to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure." (§ 2923.4.) Among other things, HBOR prohibits "dual tracking," which occurs when a bank forecloses on a loan while negotiating with the borrower to avoid foreclosure. (§ 2923.6.) HBOR provides for injunctive relief for statutory violations that occur prior to foreclosure (§ 2924.12, subd. (a)), and monetary damages when the borrower seeks relief for violations after the foreclosure sale has occurred. (§ 2924.12, subd. (b).)

Under section 2923.6, while a borrower's completed application for a first lien loan modification is pending, the servicer may not record a notice of default, notice of trustee's sale, or conduct a trustee's sale. Specifically, section 2923.6, in pertinent part, provides as follows: "If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs: [¶] (1) The mortgage servicer

makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired. [¶] (2) The borrower does not accept an offered first lien loan modification within 14 days of the offer. [¶] (3) The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification." (§ 2923.6, subd. (c).)

Section 2923.6, however, also provides: "*In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay*, the mortgage servicer shall *not* be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013, *or* who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, *unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer*." (§ 2923.6, subd. (g), italics added.)

Here, Plaintiffs have alleged that Citi, contrary to section 2923.6, subdivision (c), conducted a foreclosure sale while their completed July 2013 loan modification application was pending. Plaintiffs, however, also alleged that their July 2013 application was not their first such application. In fact, Plaintiffs expressly alleged that they submitted "*several completed* first lien loan modification applications" to Citi. In other words, Plaintiffs have alleged facts that put their claim squarely within the statute's exception, subdivision (g). By alleging multiple completed applications, Plaintiffs, in order to state a claim, were also obligated to allege other, additional facts in support of their section 2923.6 claim, facts showing that Citi was required to evaluate their July 2013 application before foreclosing because there had been a "material change" in Plaintiffs' financial circumstances since the date of their last application and that this material change had been documented by Plaintiffs and submitted to Citi. The FAC is

devoid of any such facts. Moreover, the redacted copy of Plaintiffs' July 2013 application (attached as a exhibit to the FAC) does not contain any facts showing a material change in their financial circumstances. The only facts concerning Plaintiffs' financial condition alleged in the FAC are those regarding the "severe downturn in available household finances" that resulted in their default on the loan.

In the absence of facts showing a material change in their financial circumstances such that Citi, consistent with the purposes of HBOR, would be required to evaluate the July 2013 application prior to proceeding with the foreclosure sale, Plaintiffs' second cause of action failed to state a claim under section 2923.6.

C. Third Cause of Action: Violation of section 2924f

Sections 2924 through 2924k "provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 (*Moeller*).)

The court in *Moeller, supra*, 25 Cal.App.4th 822 succinctly summarized the procedure leading up to a nonjudicial foreclosure as follows: "Upon default by the trustor [under a deed of trust containing a power of sale], the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale. (. . . § 2924; [citation].) The foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee. (. . . § 2924; [citation].) After the notice of default is recorded, the trustee must wait three calendar months before proceeding with the sale. (. . . § 2924, subd. (b); [citation].) After the 3-month period has elapsed, a notice of sale must be published, posted and mailed 20 days before the sale and recorded 14 days before the sale. (. . . § 2924f; [citation].)" (*Moeller, supra*, 25 Cal.App.4th at p. 830.)

This comprehensive statutory scheme has three purposes: "'(1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as

to a bona fide purchaser.' [Citations.]" (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 440 (*Nguyen*).)

Section 2924f , which governs the notice of sale, provides, inter alia, that the notice "shall describe the property by giving its street address, if any, or other common designation, if any, *and a county assessor's parcel number; but if the property has no street address or other common designation, the notice shall contain a legal description of the property*, the name and address of the beneficiary at whose request the sale is to be conducted, and a statement that directions may be obtained pursuant to a written request submitted to the beneficiary within 10 days from the first publication of the notice." (§ 2924f, subd. (b)(5), italics added.)

Here, Plaintiffs have alleged that that the Final Notice of Sale did not comply with section 2924f, because it did not contain any express reference to the vacant Parcel 1: the notice did not contain the APN for Parcel 1 and it did not contain a legal description of the Property. Plaintiffs' allegations regarding the purported defect in the Final Notice of Sale, however, are not enough to state a claim.

Under California law, it is settled that a "slight deviation from statutory notice requirements" alone will not invalidate a foreclosure sale. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 93 (*Knapp*).) In addition to a procedural irregularity, a plaintiff-borrower must also allege facts showing that he/she was prejudiced by the irregularity. (*Id*. at p. 96.) In *Knapp*, the plaintiff-borrower claimed that the notice of sale was served prematurely. For the *Knapp* court, the issue was as follows: "does the need for 'strict compliance' with foreclosure notice requirements . . . mean that a trustee's sale must be invalidated no matter how trivial the procedural defect?" (*Id*. at p. 93.) The court in *Knapp* found that there must be something more than a defect; there must also be prejudice as a result of that defect: "the slight procedural irregularity in the service of the Sale Notice did *not* cause any injury to Borrowers. . . . There was no *prejudicial* procedural irregularity." (*Id*. at p. 94.)

In reaching its decision, the court in *Knapp, supra,* 123 Cal.App.4th 76 relied on two cases, one by our Supreme Court (*Crist v. House & Osmonson, Inc*. (1936) 7 Cal.2d 556 (*Crist*)) and one by the Ninth Circuit applying California law (*Lehner v. United States* (9th Cir. 1982) 685 F.2d 1187 (*Lehner*).) (*Knapp*, at pp. 94–95.)

In *Crist, supra,* 7 Cal.2d 556, a borrower challenged a foreclosure sale because the sale notice's description of the property to be sold erroneously included a small vacant strip of land that had been previously released. (*Id.* at p. 557.) After reviewing a long line of cases from around the country, the court in *Crist* concluded that "[t]he rule is therefore sufficiently well settled that in the absence of any evidence that *actual prejudice* was suffered, the misdescription . . . must be of such a *substantial nature* that prejudice is likely to result to the trustors." (*Id*. at p. 559, italics added.) A key question in determining whether the defect in the sale was substantial and, as a result, prejudicial, is to ask whether the defect "'influence[d] bidders unfavorably.'" (*Ibid.*) Because the misdescription at issue in *Crist* was not prejudicial, the Court found that "trial court correctly concluded that the sale should not be invalidated by reason of the erroneous description." (*Id*. at p. 560.)

In *Lehner, supra,* 685 F.2d 1187, the plaintiff-borrower claimed that a foreclosure conducted under California law was invalid because notice of sale was sent to the wrong address, that is, the plaintiff-borrower received no written notice. (*Id*. at p. 1190.) The district court dismissed the complaint because the plaintiff-borrower had actual notice of the sale and the Ninth Circuit affirmed, explaining: "[T]he record reveals clearly that she [the borrower] knew the foreclosure sale was imminent. Her repeated efforts to delay the impending sale attest to her knowledge. . . . She makes no suggestion that the written notice would have supplied information not already known to her . . . nor did she allege that she never received actual notice of the foreclosure sale. Her constitutional argument thus boils down to due process requiring the meaningless formality of written (rather than oral) notice. [¶] We refuse to elevate form over substance." (*Id*. at pp. 1190–1191.)

Here, Plaintiffs have not alleged facts showing that the procedural irregularity in the Final Notice of Sale was prejudicial. First, as a preliminary matter, the omission of Parcel 1 from the Final Notice of Sale was not of such a substantial nature that any prejudice was likely to result to Plaintiffs. Plaintiffs had been on actual notice for almost a year and a half before the sale year that Citi intended to foreclose on the Property, that is, sell at auction the two parcels that secured Plaintiffs' loan. The Notice of Default, pursuant to which the Final Notice of Sale was recorded, referenced the deed of trust, which contained both the legal description of the Property and the APN's for both parcels. The Final Notice of Sale also referenced the deed of trust. In addition to referencing the deed of trust, the Final Notice of Sale included the Property's common street address, the APN for Parcel 2, and contact information for QLSC should Plaintiffs have any questions regarding the sale. In short, the foreclosure sale documents provided Plaintiffs (and any other interested party) with actual and constructive notice that the sale would encompass both parcels.

Second, the FAC is devoid of any facts showing (or even suggesting) that the Plaintiffs suffered any actual prejudice as a result of that the procedural defect in the Final Notice of Sale. For example, the FAC does not allege that Plaintiffs did not receive in a timely manner the Final Notice of Sale and, as a result, were unaware of the foreclosure sale. Nor does the FAC allege that that bidders at the sale were somehow deterred from bidding on the Property due to the defect in the Final Notice of Sale or that the price paid by Martingale was somehow lower than it would have been had the Final Notice of Sale included the APN for Parcel 1or a legal description of the Property.

Because Plaintiffs have not alleged facts showing actual prejudice from the procedural irregularity in the Final Notice of Sale, Citi's demurrer to Plaintiff's third cause of action was properly sustained.

D. Fourth Cause of Action: Quiet Title

A claim to quiet title requires: (1) a verified complaint, (2) a description of the property, (3) the title to which a determination is sought, (4) the adverse claims to the title

against which a determination is sought, (5) the date as of which the determination is sought, and (6) a prayer for the determination of the title. (Code Civ. Proc., § 761.020.)

Plaintiffs' quiet title claim against Citi fails because Citi no longer holds title to or has an interest in the Property. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 802–803 (*West*).) In *West*, the plaintiff-borrower obtained a home loan from Washington Mutual Bank, secured by a deed of trust. Chase Bank (Chase) subsequently acquired Washington Mutual and certain of its assets, including the plaintiff-borrower's loan. Sometime thereafter, QLSC was named as trustee for the deed of trust. (*Id*. at pp. 788–789.) When the plaintiff-borrower defaulted on her loan, Chase foreclosed, selling the property to a third party. The plaintiff-borrower sued Chase, Washington Mutual and QLSC, alleging that Chase had improperly foreclosed following various loan modification efforts, and seeking, inter alia, to quiet title against all of the defendants. (*Id*. at. p. 791.) The trial court sustained Chase's demurrer, inter alia, to the quiet title claim and the Court of Appeal affirmed: "[The plaintiff-borrower] did not satisfy [the adverse claim] element because none of the defendants to the third amended complaint has adverse claims to title." (*Id*. at p. 802.) Like Chase in *West*, Citi sold its interest in the Property to a third party. Because Citi transferred "all right[,] title[,] and interest" in the Property to Martingale, Citi no longer has an adverse interest in the Property. As a result, Plaintiffs' quiet title claim fails as a matter of law.

Even if Plaintiffs could somehow allege that Citi still has an adverse claim to title, Plaintiffs' claim would still be fatally flawed. "It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." (*Shimpones v. Stickney* (1934) 219 Cal. 637, 649; see *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477 [trustor is unable to quiet title "without discharging his debt"]; *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707 ["a mortgagor . . . cannot, without paying his debt, quiet his title against the mortgagee"].) In other words, in order to bring a quiet title action, a plaintiff must allege tender. As discussed more fully in the following section, Plaintiffs have not alleged tender.

E. Fifth Cause of Action: Cancellation of Instrument

By their fifth cause of action, Plaintiffs seek to cancel the foreclosure sale. "To obtain the equitable set aside of a trustee's sale or maintain a wrongful foreclosure claim, a plaintiff must allege that (1) the defendants caused an illegal, fraudulent, or willfully oppressive sale of the property pursuant to a power of sale in a mortgage or deed of trust; (2) the plaintiff suffered prejudice or harm; and (3) the plaintiff tendered the amount of the secured indebtedness or was excused from tendering." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062.)

Plaintiffs' cancellation claim against Citi fails to state a claim for two reasons. First, as discussed above, Plaintiffs have not alleged facts showing that there was a prejudicial defect with the Final Notice of Sale or any other aspect of the foreclosure sale. Second, as discussed below, Plaintiffs did not allege tender or any facts that would establish an exception to the rule requiring tender.

1. Plaintiffs Fail to Allege Tender

California courts have recognized the tender rule for more than a century. In fact, "'our Supreme Court, in one of its earliest decisions on the subject, said: " . . . It is apparent from the general tenor of the decisions that an action to set aside the sale, unaccompanied by an offer to redeem, would *not* state a cause of action which a court of equity would recognize."'" (*Leonard v. Bank of America etc. Assn.* (1936) 16 Cal.App.2d 341, 344.)

Courts have routinely found the tender rule applicable in postforeclosures cases (i.e., in actions challenging a completed foreclosure sale, as opposed to actions seeking to prevent the sale in the first place). (See, e.g., *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578 (*Arnolds Mgmt.*) [affirming demurrer to amended complaint because plaintiff failed to tender full amount due]; *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117 (*Karlsen*) [affirming judgment on the pleadings due to plaintiff's failure to make a valid tender].) In short, a defaulted borrower is "required to allege tender of the amount of [the lender's] secured

indebtedness in order to maintain any cause of action for irregularity in the sale procedure." (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.)

The tender rule is "premised upon the equitable maxim that a court of equity will not order that a useless act be performed." (*Arnolds Mgmt., supra,* 158 Cal.App.3d at pp. 578–579.) "The rationale behind the rule is that if plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the plaintiffs." (*FPCI RE–HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022 [affirming summary judgment in favor of defendants who conducted foreclosure sale].) The tender rule, in short, is meant to prevent courts "'from uselessly setting aside a foreclosure sale on a technical ground when the party making the challenge has not established his ability to purchase the property.'" (*Keen v. American Home Mortg. Servicing, Inc*. (E.D.Cal.2009) 664 F.Supp.2d 1086, 1101.)

As a result, "'"[t]he rules which govern tenders are strict and are strictly applied."'" (*Nguyen*, *supra,* 105 Cal.App.4th at p. 439.) "'The tenderer must do and offer everything that is necessary on his part to complete the transaction, and must fairly make known his purpose without ambiguity, and the act of tender must be such that it needs only acceptance by the one to whom it is made to complete the transaction.'" (*Gaffney v. Downey Savings & Loan Assn*. (1988) 200 Cal.App.3d 1154, 1165, italics added.) The debtor bears "responsibility to make an unambiguous tender of the entire amount due or else suffer the consequence that the tender is of no effect." (*Ibid*.)

Specifically, a tender or offer of performance must be made in good faith, must be unconditional, and the party making the tender must have the ability to perform. (§§ 1493–1495.) Section 1495 is quite explicit: "An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer." A plaintiff must show facts demonstrating that a valid and viable tender offer was made. (*Pantoja v. Countrywide Home Loans, Inc*. (N.D.Cal.2009) 640 F.Supp.2d 1177, 1184.) To prevail on an action to set aside a foreclosure on the ground that notice was improper, the challenger must "first make full tender and thereby establish his ability to purchase

the property." (*United States Cold Storage v. Great Western Savings & Loan Assn*. (1985) 165 Cal.App.3d 1214, 1225 (*United States Cold Storage*).)

Consequently, "an offer of performance is of no effect if the person making it is not able to perform." (*Karlsen, supra,* 15 Cal.App.3d at p. 118.) Simply put, if the offeror "'is without the money necessary to make the offer good and knows it . . .' the tender is without legal force or effect." (*Ibid*.) "It would be futile to set aside a foreclosure sale on the technical ground that notice was improper, if the party making the challenge did not first make full tender and thereby establish his ability to purchase the property." (*United States Cold Storage, supra*, 165 Cal.App.3d at p. 1225.) As the court in *Stebley, supra,* 202 Cal.App.4th 522, explained, "Allowing plaintiffs to recoup the property without full tender would give them an inequitable windfall, allowing them to evade their lawful debt." (*Id.* at p. 526.)

Lueras, supra, 221 Cal.App.4th 49 is illustrative. In that case, the plaintiff-borrower lost his home when his lender foreclosed after allegedly advising the plaintiff that the foreclosure sale would be postponed while the plaintiff considered foreclosure avoidance programs. (*Id.* at p. 55). The plaintiff-borrower in *Lueras* filed suit, seeking, inter alia, to quiet title. (*Ibid*.) With regard to the quiet title cause of action, the trial court sustained the lender's demurrer to the amended complaint without leave to amend and the Court of Appeal affirmed, stating that "[a] borrower may not . . . quiet title against a secured lender without first paying the outstanding debt on which the mortgage or deed of trust is based." (*Id.* at p. 86.)

Here, Plaintiffs have not properly alleged tender. In the FAC, Plaintiffs allege that "[a]t all times material to this matter and all filings, Plaintiffs Orrill have remained ready, willing, and able to tender payment to Defendant CITI in accordance with the agreements entered into by the parties." Relying on *Plastino v. Wells Fargo Bank* (N.D. Cal. 2012) 873 F.Supp.2d 1179 (*Plastino*), Plaintiffs argue that their "ready, willing and able" allegation is sufficient. Plaintiffs' reliance on *Plastino* is misplaced. In *Plastino*, the plaintiff-borrower's tender allegation was unqualified by any reference to any agreements

entered into by the parties: "PLAINTIFF'S TENDER: Plaintiff hereby tenders through this Complaint to Defendants the amounts due and owing so that the claimed default may be cured and Plaintiff may be reinstated to all former rights and privileges previously agreed to by the parties. Plaintiff is ready, willing, and able to tender those necessary sums, if any, that the Court finds due and owing in order to avail itself of the Court's equity." (*Plastino*, *supra*, 873 F.Supp.2d at pp. 1186–1187.)

Here, in contrast, Plaintiffs' tender allegation is not an unambiguous tender of the entire amount due. Rather, it is an ambiguous and qualified offer to apparently resume the monthly payments under their loan agreements. Moreover, Plaintiffs have not alleged facts showing that that they could make a full and valid tender of the entire amount due at the time of the foreclosure sale ($645,939.49). (*Fonteno v. Wells Fargo Bank, N.A.* (2014) 228 Cal.App.4th 1358, 1372 (*Fonteno*) [allegation that "plaintiffs were ready, willing, and able to make certain limited payments" insufficient to satisfy tender requirement].)

2. Plaintiffs Fail to Allege an Exception to the Tender Rule

On appeal, Plaintiffs appear to concede that they failed to properly allege tender by arguing that they fall into one or more of the exceptions to the tender rule. California courts have recognized four exceptions to the tender rule:

"First, if the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt. [Citations.]

"Second, a tender will not be required when the person who seeks to set aside the trustee's sale has a counter claim or set off against the beneficiary. In such cases, it is deemed that the tender and the counterclaim offset one another, and if the offset is equal to or greater than the amount due, a tender is not required. [Citation.]

"Third, a tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale. [Citation.] . . .

"Fourth, no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee's deed is void on its face." (*Lona v.*

Citibank, N.A. (2011) 202 Cal.App.4th 89, 112–113 (*Lona*).) Plaintiffs argue that they have pleaded facts sufficient to entitled them to the last three exceptions to the tender rule. Plaintiffs' arguments are unavailing.

First, Plaintiffs argue that tender is not required because their damage claims in this lawsuit act as a complete set-off to their mortgage indebtedness. More specifically, they argue that their damage claims are a "convertible asset which supports their ability to tender." For support, Plaintiffs cite to two cases: *Backus v. Sessions* (1941) 17 Cal.2d 380 (*Backus*) and *In re Worcester* (9th Cir. 1987) 811 F.2d 1224 (*Worcester*). Neither of these cases, however, provides the support Plaintiffs require, as neither case holds that highly contingent damage claims constitute a viable set-off to the amount owed.

In *Backus, supra,* 17 Cal.2d 380, "at the time of the written offer to restore, 'plaintiff had assets convertible to cash in the amount of $200.00 and could have borrowed $600.00 to have completed restoration of $800.00, but did not have the sum of $800.00 in cash . . . .'" (*Id.* at p. 389.) Here, Plaintiffs have not alleged facts showing that they either had assets convertible to cash to pay their outstanding obligation on the loan and/or the ability to borrow more than $600,000 to pay what they owed at the time of the foreclosure sale.

In *Worcester, supra,* 811 F.2d 1224, although the plaintiff borrower "did not have cash immediately available" to pay the obligation she owed on a 4-acre parcel containing her residence, she did have a tangible and convertible asset, namely a 40-acre parcel of unimproved land adjacent to the parcel containing her residence, a parcel that was "free of any deed of trust." (*Id*. at pp. 1226, 1231.) Here, in contrast, Plaintiffs have not identified in their pleadings (or in their briefings) any other real property or any personal property that they could sell which would satisfy their obligation on their loan. (See *Hauger v. Gates* (1954) 42 Cal.2d 752, 753–754 [cross-complaint for personal property, whose value exceed the value of the installment payments due under note and deed of trust, constituted sufficient tender].)

In short, instead of being based on tangible, immediately convertible assets, Plaintiffs' tender is based on the hope that they will someday prevail against the defendants. Under California law, hope does constitute a meaningful and effective tender. (See *Karlsen, supra,* 15 Cal.App.3d at p. 118 [finding no valid tender where "the only 'tender' made, if any, was in the form of Karlsen's *hope* that American would release a portion of the property he hoped Humble would buy"].)

Second, Plaintiffs argue that it would be inequitable to impose the tender rule on them because it would undercut the public policy of the HBOR encouraging preforeclosure discussions between borrowers and lenders. Plaintiffs supporting cases are inapposite. Those cases either involve a situation where preforeclosure discussions were required by the deed of trust (see *Fonteno, supra,* 228 Cal.App.4th at pp. 1370, 1374) or where the foreclosure sale had not yet occurred and, as a result, tender was premature (see *Mabry, supra,* 185 Cal.App.4th at pp. 225–226; *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 881–882 (*Jolley*).) Here, there is no allegation that Citi failed to comply with the deed of trust. Moreover, this is a postforeclosure sale case, not a preforeclosure one.

Plaintiffs' "inequitable" argument fails for reasons other than a lack of supporting case law. Under the circumstances here, it would be inequitable not to require them to make a valid and viable tender. Having knowingly and voluntarily entered into their loan, and then having defaulted on their loan obligations through no fault of Citi (or the other defendants), it would be unfair to waive the tender rule: "Allowing plaintiffs to recoup the property without full tender would give them an inequitable windfall, allowing them to evade their lawful debt." (*Stebley, supra,* 202 Cal.App.4th at p. 526; *cf. Humboldt Sav. Bank v. McCleverty* (1911) 161 Cal. 285, 290–291 [inequitable to require widow to tender when the debt was not hers].)

Third, Plaintiffs argue that tender is not required because the sale was void due to irregularities in the Final Notice of Sale. A sale, however, is not rendered void merely because of minor or technical defects. (See *Knapp, supra,* 123 Cal.App.4th at pp. 95–

99.) Rather, a sale is rendered void when the defects are substantial, such as when there has been a failure to give notice of sale to the trustor or to specify the correct default in the notice of default. (*Anderson v. Heart Federal Sav. & Loan Assn*. (1989) 208 Cal.App.3d 202, 211–212; *Little v. CFS Service Corp*. (1987) 188 Cal.App.3d 1354, 1357–1359, 1362.) Similarly, a sale is rendered void when the foreclosure sale is conducted by an entity that lacks authority to do so. This point is illustrated by the very case upon which Plaintiffs rely, *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868 (*Dimock*). In *Dimock*, the foreclosure sale was conducted by a trustee who had been replaced and, as a result, had no power to conduct the sale under the deed of trust. (*Id*. at pp. 874–875; see *Pro Value Properties, Inc. v. Quality Loan Service Corp*. (2009) 170 Cal.App.4th 579, 581, 583 [entity which conducted the trustee sale was not the trustee named in the deed of trust].) Here, as discussed above, the defect in the Final Notice of Sale was not substantial. In addition, the foreclosure sale was conducted by an entity that had the authority to do.

Because Plaintiffs have not alleged facts establishing an exception to the tender rule and because Plaintiffs have not alleged tender, Citi's demurrer to Plaintiffs' fifth cause of action was properly sustained.

F. Sixth Cause of Action: Fraudulent Misrepresentation

The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) These elements may not be pleaded in a general or conclusory fashion. (*Id*. at p. 645.) Fraud must be pleaded specifically—that is, a plaintiff must plead facts that show with particularity the elements of the cause of action. (*Ibid*.)

We enforce the specificity requirement in consideration of its two purposes. The first purpose is to give notice to the defendant with sufficiently definite charges that the

defendant can meet them. (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 216, superseded by statute on another ground as stated in *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.) The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, "the pleading should be sufficient '"to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud."'" (*Id*. at pp. 216–217.)

Plaintiffs' fraud claim is based exclusively on an alleged letter dated August 2, 2013, acknowledging receipt of Plaintiffs' "most recent" loan modification application. The letter merely advised Plaintiffs that the "expected time frame needed to complete the review process is 30 days from the date of this letter" and that they "may receive a call from the Specialist assigned to [their] account in an effort to obtain any additional information" and/or a "call from a property appraiser and/or real estate broker . . . ."

According to Plaintiffs, the representations in the letter were "entirely false." Plaintiffs, however, have not allege any facts establishing that any of the rather unremarkable representations in the letter were false. The representations at issue here are quite different that those at issue in the cases upon which Plaintiffs rely. There is no representation in the letter that Citi would not foreclose (see *Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1412 [defendants were "alleged to have assured the Fleets . . . that the foreclosure proceedings had been suspended"]) or that Plaintiffs had qualified for a loan modification (see *Rufini v. CitiMortgage, Inc*. (2014) 227 Cal.App4th 299, 308 [plaintiff "alleged CitiMortgage falsely told him he was approved for a permanent loan modification"]) or that Citi would modify their loan (see *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 919 ["plaintiffs received a letter from Chase confirming the trial modification plan"]). Nor were Plaintiffs told "in various ways—that it was "'highly probable,'" or "'likely,'" or "'look[ed] good'—that a modification of the loan agreement would be approved." (*Jolley*, *supra*, 213 Cal.App.4th at p. 892.) Plaintiffs here were simply told that their most recent application was under

review—nothing more. Plaintiffs have not allege any facts showing that this representation was false at the time it was made.

Nor have Plaintiffs alleged any facts establishing either actual or justifiable reliance. A plaintiff asserting fraud by misrepresentation is obliged to plead and prove actual reliance, that is, to "'establish a complete causal relationship' between the alleged misrepresentations and the harm claimed to have resulted therefrom." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1092.) In the FAC, there is, for example, no specific factual allegations showing that Plaintiffs had taken all or even any of the necessary steps to enjoin the foreclosure sale *prior* to receiving Citi's letter. There are, for example, no allegations about retaining a lawyer or preparing any legal documents or spending any time or money in any effort to legally forestall the sale. Instead, Plaintiffs merely allege in a conclusory manner that in reliance of Citi's letter they "refrained from taking legal action to enjoin the trustee's sale." More is required to show the "complete causal relationship" between what Plaintiffs were planning to do *before* they received the August 2 letter just a few short days before the foreclosure sale and what they did *after* they received the letter. In other words, Plaintiffs were required to allege specific facts showing that their receipt of the August 2 letter caused them to change course and not take legal action to prevent the foreclosure sale. No such facts were alleged.

"'Besides actual reliance, [a] plaintiff must also show "justifiable" reliance, i.e., circumstances were such to make it *reasonable* for [the] plaintiff to accept [the] defendant's statements without an independent inquiry or investigation.' [Citation.] The reasonableness of the plaintiff's reliance is judged by reference to the plaintiff's knowledge and experience. [Citation.]" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp*. (2007) 157 Cal.App.4th 835, 864–865.) In the FAC, there are no factual allegations showing why it would be reasonable for Plaintiffs to believe—based on nothing more than the August 2, 2013 letter from Citi advising them that their most recent loan modification application was under review—that the foreclosure sale was not going forward.

Because Plaintiffs failed to allege all of the elements of fraud with the requisite particularity, Citi's demurrer to the sixth cause of action was properly sustained.

G. Seventh Cause of Action: Violation of the UCL

The UCL permits civil recovery for "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." (Bus. & Prof. Code, § 17200.) To have standing to sue under the UCL, a private plaintiff must allege he or she "has suffered injury in fact and has lost money or property." (Bus. & Prof. Code, § 17204.) In *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322 (*Kwikset*), our Supreme Court held that to satisfy the standing requirement of section 17204, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by* the unfair business practice or false advertising that is the gravamen of the claim." (*Kwikset*, *supra*, at p. 327.) A UCL claim will survive a demurrer based on standing if the plaintiff can plead "'general factual allegations of injury resulting from the defendant's conduct.'" (*Id*. at p. 327.)

California courts have recognized that the loss of a home through a foreclosure sale is an allegation sufficient to satisfy the economic injury prong of a UCL claim. (See *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 522 (*Jenkins*).) However, as *Jenkins* shows, the loss of a home through a foreclosure sale is not, by itself, sufficient to establish the causation prong. (*Id*. at pp. 522–523.)

In *Jenkins*, *supra*, 216 Cal.App.4th 497, the plaintiff alleged the defendants' unlawful, unfair, and fraudulent business practices caused her home to be subject to foreclosure. The Court of Appeal held the plaintiff failed to satisfy the "caused by" prong because she admitted in her complaint that she defaulted on her loan, thereby triggering the power of sale clause in the deed of trust that made her home subject to foreclosure. (*Id*. at pp. 522–523.) The court explained: "As [the plaintiff]'s home was subject to nonjudicial foreclosure because of [the plaintiff]'s default on her loan, which occurred *before* Defendants' alleged wrongful acts, [the plaintiff] cannot assert the

impending foreclosure of her home (i.e., her alleged economic injury) was caused by Defendants' wrongful actions. Thus, even if we assume [the plaintiff]'s third cause of action alleges facts indicating Defendants' actions violated at least one of the UCL's three unfair competition prongs (unlawful, unfair, or fraudulent), [the plaintiff's complaint] cannot show any of the alleged violations have a causal link to her economic injury." (*Id*. at p. 523, italics added; see *Lueras*, *supra*, 221 Cal.App.4th at pp. 82–83 [nonjudicial foreclosure proceedings triggered by default are not economic injury caused by UCL violations]; see generally *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1099 [causation requirement of UCL not met if plaintiff-tenants would have suffered "the same harm whether or not a defendant complied with the law"].)

Here, Citi's allegedly unfair conduct occurred after Plaintiffs defaulted. Because Plaintiffs have not alleged facts to establish their standing to bring a UCL claim, Citi's demurrer to their seventh cause of action was properly sustained.

III. Plaintiffs Failed to Allege a Cause of Action Against QLSC

In the FAC, Plaintiffs asserted three causes of action against QLSC: (1) a violation of section 2924f (i.e., a claim that QLSC failed to properly notice the foreclosure sale); (2) a quiet title claim; and (3) a cancellation of instrument claim. QLSC's demurrer to each of these claims was properly sustained.

As discussed above, Plaintiffs failed to allege facts showing that the procedural irregularity in the Final Notice of Sale (the omission of any express reference to the vacant Parcel 1) was prejudicial. (*Knapp*, *supra*, 123 Cal.App.4th at p. 96.) Accordingly, Plaintiffs have failed to state a claim against QLSC for violation of section 2924f. With regard to the quiet title claim, Plaintiffs have not and cannot allege facts showing that QLSC had an adverse claim to title. (*West*, *supra*, 214 Cal.App.4th at pp. 802–803; see *Jensen v. Quality Loan Service Corp.* (E.D. Cal. 2010) 702 F.Supp.2d 1183, 1198 [California statutory quiet title action insufficiently pleaded where complaint failed to allege adverse claims to title].) In addition, as discussed above, Plaintiffs have failed to

allege tender or an exception to the tender rule. This failure is fatal to both the quiet title claim and the cancellation of instruments claim against QLSC.

IV. Plaintiffs Failed to Allege a Cause of Action Against Martingale

In the FAC, Plaintiffs asserted three causes of action against Martingale: (1) a quiet title claim; and (2) a cancellation of instrument claim. Martingale's demurrer to each of these claims was properly sustained.

As discussed above, Plaintiffs were required to allege facts establishing tender (or an exception to tender) in order to assert both their quiet title and cancellation claims. Plaintiffs, however, have failed not done so, rendering both claims defective. Even if Plaintiffs' had not failed to allege a credible ability to tender the indebtedness due on their loan, we find that Plaintiffs failed to state a claim against Martingale based on their allegations that the foreclosure sale should be set aside based upon procedural irregularities in the notice of sale. "[W]here the trustee delivers a deed to the buyer at the foreclosure sale, and the deed recites that all procedural requirements for the default notice and sale notice have been satisfied, there is a statutory rebuttable presumption that such notice requirements have been fulfilled." (*Melendrez v. D & I Investment, Inc*. (2005) 127 Cal.App.4th 1238, 1255.) With regard to the sale itself, a "nonjudicial foreclosure sale is accompanied by a common law presumption that it 'was conducted regularly and fairly' . . . [which] may only be rebutted by *substantial* evidence of *prejudicial* procedural irregularity." (*Id.* at p. 1258, italics added.) As a result, "[i]t is the burden of the party challenging the trustee's sale to prove such irregularity and thereby overcome the presumption of the sale's regularity." (*Ibid*.) As discussed above, Plaintiffs failed to allege facts establishing a prejudicial procedural irregularity.

V. Plaintiffs Fail Show a Reasonable Probability of a Successful Amendment

Although California has liberal policy in favor of amendment, it is not sufficient for a plaintiff to assert "'an abstract right to amend.'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491.) To satisfy his or her burden on appeal, "'a plaintiff "must show in what manner he can amend his complaint and how that

amendment will change the legal effect of his pleading." [Citation.] . . . The plaintiff must clearly and specifically set forth the "applicable substantive law" [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action.'" (*Rossberg*, *supra*, 219 Cal.App.4th at p. 1491.) Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co*. (1992) 7 Cal.App.4th 1088, 1098; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 513, fn. 3.) Also, leave to amend should not be granted where an amendment would be futile. (*Newell v. State Farm General Ins. Co*. (2004) 118 Cal.App.4th 1094, 1100.) It is axiomatic, "The law neither does nor requires idle acts." (§ 3532.)

Here, Plaintiffs assert that they should be given an opportunity to further amend their pleading so as to assert three additional and related claims: negligence; negligent misrepresentation; and promissory estoppel. Plaintiffs, however, do not offer any new facts to support these claims. In other words, Plaintiffs have elected to stand by the facts alleged in the FAC, facts which we hold do not support the claims already asserted. Because Plaintiffs have not offered any new facts to support any existing or proposed claims, we hold that the trial court did not abuse its discretion in sustaining defendants' demurrers without leave to amend.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.